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No. 96-437

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1996

JULIA A. CHRISTIANS, TRUSTEE
Petitioner,
vs.
CRYSTAL EVANGELICAL FREE CHURCH
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner's constitutional challenges to the Religious Freedom Restoration Act, 42 U.S.C. §2000bb et seq. (1994), were presented to the Court of Appeals.

2. Whether the Bankruptcy Code authorizes, and the Free Exercise Clause and the Religious Freedom Restoration Act permit, a trustee in bankruptcy to recover from the debtors' church the amount of contributions that debtors made in good faith and ordinary course in the year preceding bankruptcy, where there is no evidence of intent to hinder or defraud creditors.

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STATEMENT OF THE CASE

The procedural history and substantive issues are complex, but one simple fact is dispositive fact in this Court: *petitioner never presented to any court below the constitutional questions allegedly presented in the petition.* The majority in the Court of Appeals held that:

> The parties did not raise the constitutionality of the RFRA, and we do not consider the constitutionality of the RFRA.

Pet. A22. The dissenter agreed:

> I understand that the constitutionality of RFRA is not before us as this case is currently postured.

Id. at A31 n.1 (Bogue, J., dissenting).[1]

This unanimous holding of waiver was clearly correct, and in any event, the waiver issue plainly does not deserve review in this Court. The details are as follows.

Bruce and Nancy Young, who are not parties to this adversary proceeding, filed for personal bankruptcy in 1992. The cause of the bankruptcy was the debtors' personal guarantees of the obligations of a failed business. Aff. of Bruce Young (Sept. 25, 1992). The debtors' sworn

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[1] The Petition for Writ of Certiorari, and the Appendices thereto, are cited as Pet. Page numbers beginning with A are part of the Appendices; unless otherwise indicated in parentheses, all citations to page numbers beginning with A are to the opinion of the Court of Appeals. The Appendices include a Stipulation, parenthetically designated as Stip.

bankruptcy schedules showed total liabilities of $405,097.19 and no non-exempt assets. Pet. A108 (Stip.).

In the year preceding bankruptcy, the debtors had contributed $13,450 to defendant, respondent here, Crystal Evangelical Free Church. *Id.* at A106 (Stip.). Petitioner, the Trustee in bankruptcy, sued the Church to recover these contributions as fraudulent transfers under 11 U.S.C. §548(a)(2) (1994), alleging that the contributions were made while the debtors were insolvent and that they were not in exchange for reasonably equivalent value. No issue was raised under the companion section, 11 U.S.C. §548(a)(1) (1994), which authorizes the Trustee to recover transfers made "with actual intent to hinder, delay, or defraud" any creditor. There is no suggestion that the contributions were not made in good faith and in the ordinary course of a long-standing pattern of contributions. Thus, "the trustee has not accused the debtors and the church of any improper conduct, much less actual fraud." Pet. A13.

The Bankruptcy Court and the District Court each entered judgment that the Trustee was entitled to recover the disputed contributions from the Church. *Id.* at A99 (Bankruptcy Court), A74 (District Court). The Church appealed, raising multiple arguments. The Church argued that §548(a)(2) does not authorize the Trustee's claim, that the Trustee's interpretation of §548(a)(2) discriminates against religion in violation of the Free Exercise Clause, and that §548(a)(2) must be interpreted to avoid this unintended burden on religious exercise, citing *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979).

On May 28, 1993, pursuant to Fed. R. App. Proc. 44, the Church notified the clerk that it was challenging the

constitutionality of §548(a)(2) as applied.[2] The clerk failed to act on this notice, and the parties and their amici briefed the case. In November 1993, the President signed the Religious Freedom Restoration Act, 42 U.S.C. §2000bb et seq. (1994), and each side and the amici filed supplemental briefs addressed to that Act.

On Feb. 9, 1994, after briefing and supplemental briefing was completed, the clerk at last notified the Attorney General of the Church's constitutional claim.[3] The United States intervened and filed a brief, and all parties and amici were invited to respond with a third round of briefs. Thereafter, after the case had come to focus more on the interpretation of RFRA than on the constitutionality of §548(a)(2), the United States withdrew its brief and withdrew its intervention.

In May, 1994, this Court held that §548(a)(2) should not be interpreted in ways that upset practices that had long co-existed with the law of fraudulent transfers. *BFP v.*

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[2] Fed. R. App. Proc. 44 provides:

> *It shall be the duty of a party* who draws in question the constitutionality of any Act of Congress in any proceeding [where the government is not a party] upon the filing of the record, or as soon thereafter as the question is raised in the court of appeals, *to give immediate notice in writing* to the court of the existence of said question. The clerk shall thereupon certify such fact to the Attorney General.

(emphasis added).

[3] The Court of Appeals' statement that no party had requested notification to the Attorney General is incorrect. *Compare* Pet. A10 (opinion of the Court of Appeals) *with* Pet. 1 (accurate statement of Trustee that the Court's notice to the Attorney General followed "a request by Appellant (Respondent in this Court), who had challenged the constitutionality of 11 U.S.C. §548(a)(2)").

Resolution Trust Corp., 114 S.Ct. 1757 (1994). The Church called this decision to the attention of the Court of Appeals in a letter under Fed. R. App. Proc. 28(j).

The case was argued by the parties and amici in September, 1994, and remained under submission until May, 1996. The Court of Appeals then interpreted §548(a)(2) to authorize the Trustee to recover the contributions to the Church. Pet. A12-A18. In making this interpretation, the Court of Appeals did not consider either *Catholic Bishop* or *BFP*. The Court of Appeals then held that §548(a)(2), as so interpreted, substantially burdens a religious practice and is not necessary to serve any compelling interest. Pet. A24-A30. Thus, the Court held, the Religious Freedom Restoration Act provides a defense to the Trustee's claim under §548(a)(2), and the Trustee is not entitled to recover from the Church. Pet. A31. The Court therefore found it unnecessary to reach the free exercise challenge to §548(a)(2). Pet. A19.

Were this Court to grant certiorari to consider the statutory question raised in the petition, the Church would defend the judgment below on each of the alternate grounds that support the judgment. No conditional cross-petition is necessary, because none of these grounds would in any way change the judgment of the Court of Appeals, which was simply that the Trustee take nothing by her complaint. *See, e.g., Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 n.7 (1984); *Langnes v. Green*, 282 U.S. 531, 535-39 (1931).

REASONS FOR DENYING THE WRIT

I. No Constitutional Issues Are Presented, Because None Were Presented Below.

The Trustee purports to present three questions concerning the constitutionality of the Religious Freedom Restoration Act. But the key to the case finally appears near the end of the petition: "*[B]oth the majority and the dissent* incorrectly *stated that the constitutionality of RFRA was not before them.*" Pet. 25 (emphasis added).

All the lengthy argument purportedly addressed to "The Eighth Circuit's Decision Upholding RFRA," *id.* at 11, 16, is thus misleading. There was no decision upholding RFRA; there was only a decision that the Trustee had not challenged RFRA's constitutionality. The only question presented with respect to the constitutional issues is a simple question of waiver, with facts unique to this case. The constitutional issues are not reviewable here; petitioners cannot present to this Court arguments that were not presented below. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

The waiver issue itself, which is presented, is plainly not deserving of review in this Court. In any event, the Court of Appeals was clearly correct; the Trustee did not raise constitutional issues in any way that was even arguably timely.

The majority and the dissent agreed that no constitutional challenge to RFRA had been presented. Pet. A22 (majority), A31 n.1 (dissent) (both quoted *supra* at 1). These judges were not seeking to duck the issue. To the contrary, the dissenter plainly regretted his inability to reach the constitutional issue. *Id.* Judge McMillian, who wrote

for the majority, had earlier demonstrated his willingness to reach the issue. *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996) (McMillian, J., concurring), *cert. denied* (No. 96-5016, Oct. 7, 1996). The simple fact is that the Trustee provided no way for any court to reach the issue.

This case was briefed three times prior to oral argument--the original briefs, supplemental briefs addressed to RFRA, and briefs addressed to the intervention of the United States. None of those briefs raised any of the constitutional arguments now asserted.

The Trustee first raised a version of her Question 1--that RFRA unconstitutionally favors religion--at oral argument, conditionally and in answer to a question. She quotes these two sentences of the oral argument at Pet. 26. Those two sentences are the best that she can do. She also says, without quotation or citation to any page number, that she made this argument in her second brief. *Id.* at 25-26. She did not, and whatever implied allusion she might be referring to must have been vaguer, shorter, or less explicit than the two sentences she quotes from oral argument. If she had ever said anywhere that "RFRA is unconstitutional," she would have quoted that.

The Trustee first raised her Question 3--the separation of powers argument--in a letter to the Court of Appeals, dated Jan. 23, 1996, sixteen months *after* oral argument. She does not claim otherwise; she attributes this argument to "post-hearing submissions." Pet. 26.

The Trustee's Question 2, whether RFRA violates the entanglement prong of this Court's Establishment Clause doctrine, was never presented below, not even on rehearing. The petition says vaguely that "all the constitutional issues were debated in the court of appeals," but it never says when

or where the Question 2 was presented. In fact, it was not presented.

The Trustee made no effort to have any constitutional challenge certified to the Attorney General, as required by 28 U.S.C. §2403 (1994), until the Suggestion for Rehearing En Banc. If the Trustee had actually challenged the constitutionality of RFRA, Appellate Rule 44 would have imposed a "duty . . . "to give immediate notice in writing" of the constitutional claim.[4] The Trustee's first effort to comply with this duty came in a footnote to the Suggestion for Rehearing En Banc.

All parties in the case were well aware of Rule 44; the Church had timely notified the Court of its as-applied constitutional challenge to §548(a)(2), and this notice had led to the intervention of the United States. It was not that the Trustee forgot about Rule 44, but rather that she had made no constitutional challenge to RFRA and never conceived herself to be making such a challenge.

It is true that as the prevailing party in the District Court, the Trustee could defend the judgment on any ground that would support it. But this means only that arguments not relied on by the District Court could be timely asserted in the Court of Appeals. This rule did not mean that new arguments could be raised after briefing was complete, or after judgment was entered; the right to defend the District Court's judgment on any ground does not excuse appellees from the necessities of orderly appellate litigation. Despite three rounds of briefing, four post-argument letters to the Court of Appeals, and the passage of nearly three years from the filing of the appeal to its disposition, the Trustee did not

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[4] The Rule is quoted in note 2, *supra*.

clearly formulate a constitutional challenge to RFRA or seek the participation of the Attorney General until her Suggestion for Rehearing En Banc. Litigation must come to an end sometime, and the Court of Appeals correctly held that this argument came far too late.

The Court of Appeals decided only the waiver issue, so that the constitutional issues are not presented. Even if there were some plausible argument that the Court of Appeals erred on the waiver issue, the waiver issue is purely factual and of no general importance; it plainly does not deserve review in this Court. Either way, there is nothing to be decided here.

II. This Case Should *Not* Be Held for *City of Boerne v. Flores* or Any Other Case in Which the Constitutionality of RFRA Might Be Decided.

This Court recently granted certiorari in *City of Boerne v. Flores* (No. 95-2074), presenting the question whether RFRA is constitutional as applied to state and local governments. If the constitutional issues had been preserved in this case, there would be some overlap between this case and *Flores*, although the focus here would be on the quite distinct question whether RFRA is constitutional as applied

to federal law.[5] But the essential point is that none of those issues were preserved.

Petitioner concedes that all three judges below concluded that the constitutional challenge was waived here. Pet. 25. The only issue decided was waiver, and *Flores* could not possibly cast any light on waiver. On reconsideration in light of *Flores*, the Court of Appeals could only decide once again that the constitutional challenge was waived. A hold could do nothing but further delay the resolution of this long-delayed litigation.

III. The Statutory Question Is a Fragment of a Much More Complicated Question, Not Adequately Presented in the Petition and Not Ready for Review by this Court.

In a brief passage near the end of the petition (Pet. 23-25), the Trustee attempts to present a fourth Question: whether RFRA permits unsecured creditors of bankrupt debtors to recover from the debtors' church the amount of contributions that were made in good faith and ordinary course in the year prior to bankruptcy. There are many reasons not to review this Question.

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[5] Congressional power to enact RFRA is especially clear with respect to federal law. All Congress has done is to limit the reach of laws that *it* enacted, laws over which *it* has plenary power. Either limiting or extending the reach of §548(a)(2) is equally an exercise of the bankruptcy power; Article I authorizes Congress to determine the reach of laws that it enacts pursuant to Article I. *See EEOC v. Catholic Univ.*, 83 F.3d 455, 470 (D.C. Cir. 1996) (rejecting, with a justified tone of incredulity, the argument that Congress cannot apply RFRA to federal law).

First, there is no split in the circuits; the decision below is the only appellate decision on the issue. The Trustee properly does not claim any conflict with *Scholes v. Lehmann,* 56 F.3d 750, 759-61 (7th Cir.), *cert. denied sub nom. African Enterprise, Inc. v. Scholes*, 116 S.Ct. 673 (1995), in which the proceeds of a Ponzi scheme were donated to various religious organizations. In that case, no RFRA or free exercise claim was decided. *See* 56 F.3d at 760. Moreover, the case proceeded under an Illinois law that parallelled §548(a)(1), 56 F.3d at 753, and there was overwhelming evidence of actual intent to defraud creditors. Here, there is no such evidence and no such claim, Pet. A13, and the proceeding is brought under the prophylactic rule of §548(a)(2).

Second, the petition does not present "whatever is essential to ready and adequate understanding of the points requiring consideration;" that alone "is sufficient reason for the Court to deny a petition." Sup. Ct. Rule 14.4. Issues that required three rounds of complicated briefing are presented in less than three pages; the petition simply omits issues that are inextricably intertwined with the issues allegedly presented. The Court cannot determine whether the Church or the debtors are substantially burdened under RFRA, or whether that burden serves a compelling interest by the least restrictive means, without understanding whether and how the Bankruptcy Code applies to the disputed transactions. Nor can the Court understand how the Bankruptcy Code applies without understanding the Church's claim that the Trustee's interpretation of the Bankruptcy Code would discriminate against religion in violation of the Free Exercise Clause.

Third, and related to the points omitted from the petition, this dispute is of unusual complexity. Each side offers many alternate theories and many fine distinctions.

Not only is there no conflict in the circuits on the end result, but there is no conflict on any of the constituent issues. The courts of appeals have not begun to explore all the variations. Some of these alternate theories have not been decided by any appellate court; none have been decided by more than one. These issues require further clarification through further litigation before they are ripe for review by this Court.

Fourth, the decision below was clearly correct on the issue the Court of Appeals found dispositive. If RFRA does not apply when the law reaches inside a church to reverse and nullify a completed act of religious obligation, then RFRA would be trivialized from the beginning.

We offer some explanation of the underlying issues to illustrate these points. Most fundamentally, the Trustee and the courts below misinterpreted §548(a)(2). The section authorizes the Trustee to recover certain transfers of property not in exchange for reasonably equivalent value. The statute defines "value" as "property," but the courts have sensibly interpreted property to include any thing of value. Paid-for entertainment counts as value; it has "psychic and other intangible values." *In re Chomakos*, 69 F.3d 769, 772 (6th Cir. 1995), *cert. denied sub nom. Allard v. Flamingo Hilton*, 116 S.Ct. 1568 (1996). In a service economy, it is obvious that services must count as value. *See, e.g., In re Investors Funding Corp.*, 523 F. Supp. 533, 549-50 (S.D.N.Y. 1980) (noting that "the only conceivable basis for a claim" to the contrary would be if the services were not performed "in accordance with accepted professional standards," and holding that a malpractice claim could not be litigated in the guise of a fraudulent transfer claim). It is equally settled that executory promises count as value. Pet. A85-A89 (opinion of the Bankruptcy Court, collecting authorities). If either services or promises did not

generally count as value, it would be unnecessary for §548(d)(2) to create an exception, providing that an executory promise to provide support to the debtor is not value.

The debtors received from the Church worship services, other pastoral services, and the use of a physical facility in which to worship. These services were of great value to the debtors, and they are of constitutional value under the Free Exercise Clause. These services could not be resold for cash, but that does not distinguish them from most other services provided to consumers. Most consumer expenditures provide value of some sort to the consumers, but very few consumer expenditures provide any value to the consumers' creditors. Services and perishables are quickly consumed; most consumer "durables" rapidly depreciate; homes and many other consumer purchases are exempt from the claims of creditors. If religious services were of value to the debtors, it is irrelevant that they cannot be converted to cash for creditors.

The Bankruptcy Court correctly found that "the debtors, before and after making their contributions, did receive services," and that "[t]he debtors plainly benefited from acts performed by the church." Pet. A85 n.7 (opinion of the Bankruptcy Court). The District Court acknowledged that the debtors received benefits from the Church, but seemed to doubt whether those benefits counted as value. *Id.* at A56-A57 (opinion of the District Court). The Court of Appeals assumed that the debtors received valuable services from the Church and that the value of these services was reasonably equivalent to the contributions. *Id.* at A17 & n.4. But all three courts held that the equivalent value the debtors received from the Church was not in exchange for the debtors' contributions. *Id.* at A17-A18 (Court of Appeals); *id.* at A58-A59 (District Court); *id.* at A89-A90

(Bankruptcy Court). That is, each court held that the debtors could have taken advantage of the Church, consuming its services without contributing to the cost of producing those services.

This wooden interpretation of "in exchange for" was error. *See* Pet. A39-A42 (Beam, J., concurring in denial of rehearing en banc); *In re Moses*, 59 B.R. 815 (Bankr. N.D. Ga. 1986); *In re Missionary Baptist Found.*, 24 B.R. 973 (Bankr N.D. Tex. 1982). If church members collectively did not contribute, the Church could not exist, and the debtors would have received no valuable religious services from the Church. The debtors contributed their fair share, calculated in accordance with their understanding of religious obligation, to the cost of services that they valued highly. The congregation and each member received religious services in exchange for the congregation's, and therefore each member's, contributions. This transaction is different in kind from the fraudulent transactions that §548(a)(2) is designed to detect.[6]

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[6] This interpretation of "in exchange for" in §548(a)(2) is consistent with the rule of *Hernandez v. Commissioner*, 490 U.S. 680 (1989), that the Commissioner of Internal Revenue may disallow charitable-contribution deductions for payments made in exchange for specific benefits, interpreting 26 U.S.C. §170 (1994). (In fact, the Commissioner generally allows deductions for payments made even in explicit exchange for religious benefits that lack market value. Rev. Rul. 70-47, 1970-1 Cum. Bull. 49; *see Powell v. United States*, 945 F.2d 374 (11th Cir. 1991)).

Contributions to churches, made in the general expectation of receiving religious services from the church, may be a gift under the Internal Revenue Code and an exchange under the Bankruptcy Code, if the interpretation of each Code is consistent with that Code's policy. In fact, a common policy underlies both interpretations: In the case of charitable, educational, and religious organizations that depend on contributions from their members, both tax deductibility and nonliability

Two rules of interpretation highlight the error of the courts below. First, §548(a)(2) should not be interpreted "to disrupt the ancient harmony" of long settled understandings of proper behavior by debtors and creditors. *BFP v. Resolution Trust Co.*, 114 S.Ct. 1757, 1764 (1994). In *BFP*, this Court held that §548(a)(2) does not invalidate the long-established practice of bidding far less than the market value of property at foreclosure sales, and the Court emphasized that "reasonably equivalent value" does *not* mean market value. *Id.* at 1761. Similar considerations apply here. Fraudulent transfer law is of ancient origin, yet we are aware of no effort to apply that law to routine contributions to churches prior to *In re Missionary Baptist Found.*, 24 B.R. 973 (Bankr. N.D. Tex. 1982). That effort was unsuccessful, although the facts there made the claim more plausible than here. Another such claim was rejected in *In re Moses*, 59 B.R. 815 (Bankr. N.D. Ga. 1986). We are not aware of any case upholding such a claim prior to the decision of the Bankruptcy Court in this case, a decision that has now been properly reversed on RFRA grounds.

Second, §548(a)(2) should not be interpreted to burden religious exercise in the absence of an affirmatively expressed Congressional intent to impose such a burden. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). RFRA confirms the wisdom of *Catholic Bishop*. RFRA shows that by overwhelming margins, Congress does not want to burden religion without compelling reason. Given that policy

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to fraudulent transfer claims encourage contributions and discourage "free riders" who take advantage of the opportunity to benefit without contributing. The lower courts' interpretation of the Bankruptcy Code in this case virtually requires church members facing financial risks to free ride, a result that is seriously inconsistent with the Internal Revenue Code's policy of rewarding those who do not free ride.

commitment, this Court was plainly right to presume that Congress would not want to burden religion inadvertently.

Of course there is no affirmative evidence that Congress intended §548(a)(2) to make churches liable to refund contributions from members who later file for bankruptcy. Congress intended §548(a)(2) to simplify litigation in inherently suspicious transactions--cases in which insolvent debtors give away money or property and get nothing in return that is of any value even to the debtors. But the debtors' transactions here were not suspicious, and the debtors certainly did not believe that they were getting nothing in return for their contributions. This case is simply not within the set of suspicious transactions that Congress addressed. It can appear to be similar only because the courts below erroneously assessed an exchange of religious values by the norms of commercial exchanges in which the parties mistrust each other and must necessarily insist on legally binding commitments to perform.

The Court of Appeals' interpretation of "in exchange for" distinguishes churches from secular groups, on the ground of a feature that is essential to churches. Every private club or association must raise money to support its operations. Secular clubs generally charges dues for membership and fees for services; members who do not pay are excluded. Thus, if the debtors had paid the money at issue to their country club, the Trustee would recognize the transfer as a payment in exchange for club membership and club services.

The debtors' contributions to their Church served the same economic function for the Church as payments of dues and fees to a country club: they enable the association to function. But churches cannot exclude those who fail to pay; such a policy would eliminate evangelism and charitable

works, and thus fundamentally change the nature and mission of most churches. So the Court of Appeals interpreted §548(a)(2) to apply here because of--*solely and precisely because of*--a practice that is essential to the mission and structure of churches. This discrimination against religious practice would require compelling justification under the Free Exercise Clause, even if RFRA had never been enacted. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div. v. Smith*, 494 U.S. 872 (1990).

The Trustee's interpretation of §548(a)(2) also discriminates against religion in other ways, some of which further reveal that the interpretation is a misinterpretation. Section 547 authorizes the Trustee to recover certain transfers that prefer some creditors over others, but not if the transfer was "made in the ordinary course of the business or financial affairs of the debtor and the transferee." 11 U.S.C. §547(c)(2) (1994). Thus, regular monthly payments to a preferred creditor are not recoverable, because there is nothing suspicious about continuing a series of payments in ordinary course.

There is no comparable ordinary-course exception in §548(a)(2), even though there is nothing suspicious about continuing a series of contributions in ordinary course.[7] Under the Trustee's interpretation, the lack of an ordinary-course exception in §548(a)(2) discriminates against ordinary-course contributions, most of which go to churches, as compared to ordinary-course payments to preferred

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[7] A case where the debtor suddenly gave a large portion of his assets to his church on the eve of bankruptcy would arguably be very different; the contribution would not be in ordinary course, and the timing and irregularity of the transaction might be badges of fraud, supporting a possible inference of intent to hinder creditors under §548(a)(1).

creditors under §547, which rarely go to churches. This discrimination requires compelling justification. But it also casts doubt on the Trustee's interpretation of the statute. Most likely, the reason there is no ordinary-course exception in §548(a)(2) is that the section was never intended to apply to ordinary-course transactions that raised no suspicion of fraud. Congress was not thinking about routine contributions to churches; it was thinking about simplifying the litigation of suspicious transactions.

We have not yet noted the most fundamental discrimination in the Trustee's interpretation of §548(a)(2)--its discriminatory rules about what debtors can do with their property in the year preceding bankruptcy. The general rule in bankruptcy is that the debtors control the disposition of their funds prior to bankruptcy. The debtors' money is *not* the property of the unsecured creditors; it remains the property of the debtors until the creation of a bankruptcy estate. 11 U.S.C. §541 (1994). Section 548(a) recognizes the debtors' ownership; it expressly and exclusively applies only to transfers "of an interest *of the debtor* in property." Debtors can and do spend their money in all sorts of ways that produce value to them, but no value to their creditors. Indeed, this pattern of spending is the essence of why debtors go bankrupt.

These other expenditures that produce no value for creditors are not fraudulent transfers recoverable by trustees in bankruptcy, even in extreme cases. Thus, debtors who gamble their money away in casinos have not committed a fraudulent transfer. *In re Chomakos*, 69 F.3d 769 (6th Cir. 1995), *cert. denied sub nom. Allard v. Flamingo Hilton*, 116 S.Ct. 1568 (1996). Debtors who waste their money on travel, fine meals, alcohol, or prostitutes all receive something in return, and thus have not committed fraudulent transfers. *See id.* at 772. Debtors who spend all their

money on exempt property have not committed fraudulent transfers, even though they deprive their creditors of all value in their property. *See, e.g., In re Armstrong*, 931 F.2d 1233 (8th Cir. 1991). There is even authorities that debtors who pay debts barred by the statute of limitations have not committed fraudulent transfers, because the moral obligation is sufficient to justify the transfer. *In re Prejean*, 994 F.2d 706 (9th Cir. 1993).

The general rule is that the Bankruptcy Code protects the debtors' discretion to use their own money prior to bankruptcy. One of the very few things debtors cannot do, under the Trustee's interpretation, is give money to their church.

The result of these rules is that some 96% of chapter 7 bankruptcies are no-asset cases. Michael J. Herbert & Domenic E. Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed During 1984-1987*, 22 U. Rich. L. Rev. 303, 310-11 & n.30 (1988) (reporting local and national data). Non-tithing debtors dissipate their funds in other ways; there is no basis for the Trustee's belief that the creditors would get more if debtors were prevented from tithing, and thus no basis for the Trustee's belief that the creditors' money somehow went to the Church. To the contrary: creditors would benefit from the Trustee's proposed rule only if debtors *do* tithe and thus enable the Trustee to sue churches. The Trustee's interpretation would make churches the principal source of funds for distribution in consumer bankruptcies. As the dissenting judge argued, this liability would be "one of the creditor's *few* protections." Pet. A36 (Bogue, J., dissenting) (emphasis added). But Congress could not (even if it had so intended) put the religious practice of tithing in a narrow exception to the general rule of the bankruptcy system, burdening tithing

to provide an unusual protection for creditors when it is mostly unwilling to burden secular transactions to provide more general protections for creditors. This discrimination against religion requires compelling justification under *Smith* and *Lukumi*. See *supra* at 16.

All of these issues under the Bankruptcy Code and the Free Exercise Clause are necessarily entailed in the statutory RFRA issue that the Trustee sought so inadequately to present to this Court. With respect to that issue, the decision below is clearly correct. RFRA provides that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1(b) (1994). The Court of Appeals held that allowing the Trustee to recover the debtors' contributions to the Church would substantially burden the debtors' free exercise of religion, because "the debtors consider tithing to be an important expression of their sincerely held religious beliefs," and recovery of these contributions "would effectively prevent the debtors from tithing." Pet. A25. The Court of Appeals further held that the government has no compelling interest in authorizing the Trustee to recover these contributions, because an exemption for good-faith religious contributions would not "undermine the integrity of the bankruptcy system as a whole," and an exemption's impact on particular debtors and creditors is simply not as important as interests that have been held compelling. *Id.* at A29-A30. Thus, under the explicit provisions of RFRA, the burden of §548(a)(2) cannot be applied to the debtors or the Church.

A contrary holding would trivialize RFRA. If the decision below were reversed, it would become a checklist

item in every individual bankruptcy to demand return of any contributions to churches; churches would become the most common source of partial payment in consumer bankruptcies. This liability would impose substantial financial burdens on churches, and it would reverse and nullify acts of religious obligation.

The government cannot possibly have a compelling interest in maximizing the recovery for creditors when the Bankruptcy Code as a whole is so solicitous of debtors. Debtors here held $308,010 in assets that are exempt from all claims of creditors. Pet. A107-A108 (Stip.). Congress had reasons that it deemed sufficient for such generous exemptions, but this policy judgment plainly reveals that Congress does *not* pursue a policy of maximizing recovery for creditors. "There can be no serious claim" that such a neglected interest is compelling. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993); *see, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119-20 (1991); *Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989).

Any gift to a church made for the purpose of hindering creditors is recoverable under §548(a)(1); there is no such claim here. There is no compelling reason to subject churches to the prophylactic rule of §548(a)(2), which was designed only to simplify proof of likely frauds, and there is no reason in the policy of the statute to apply it to ordinary-course contributions to churches where there are no badges of fraud.

The foregoing analysis demonstrates both the complexity of this case and the probable correctness of the judgment below. There is no split in the circuits, the issues are not adequately presented in the petition, and the competing positions have not been developed through a

series of cases. At best it would be premature for this Court to consider these issues, and in fact, it may never be necessary for this Court to consider these issues.

CONCLUSION

The constitutional challenge to RFRA is not presented; it was clearly, unambiguously, irretrievably waived. The statutory issues are not adequately presented and are not ready for review by this Court. The free exercise issue, the *BFP* issue, and the *Catholic Bishop* issue, were never passed on below. Petitioner should not be allowed to re-open this very complicated and long-delayed litigation, whatever this Court ultimately holds about the constitutionality of RFRA. The petition for writ of certiorari should be denied.

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